3

SUPREME COURT OF THE UNITED STATES.

No. [illegible] ORIGINAL.

IN THE MATTER OF EDWARD M. YERGER, PETITIONER.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

FILED OCTOBER 2, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 17.—ORIGINAL.

EX PARTE IN THE MATTER OF EDWARD M. YERGER, PETITIONER.

MOTION AND PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

INDEX.

	Original.	Print.
Motion	1	1
Petition	2	1
Exhibit: Transcript of proceedings before district judge of the United States for the district of Mississippi	6	2

1 EX PARTE EDW'D M. YERGER.

Motion on behalf of petitioner that this application be heard on Friday next.

P. PHILLIPS,
JAS. M. CARLISLE,
Att'ys for Pet.

FRIDAY, 8 *Oct'r*, 1869.

2 To the honorable the Supreme Court of the United States of America:

The petition of Edward M. Yerger respectfully shows that he is a citizen of the State of Mississippi and of the United States of America, and is illegally imprisoned and restrained of his liberty under color of the authority of the United States, and in violation of the Constitution and laws of the United States, at the military post of Jackson, in the State of Mississippi, by the commanding officer of the military post at Jackson, Mississippi, who is believed to be at this time either R. S. Granger, brevet major general in the United States army, or J. S. Fletcher, brevet lieut. colonel in the United States army, acting under appointment and by authority of A. Ames, brevet maj. general in the United States army, commanding officer of the fourth military district. The pretended authority under and by which your petitioner is so held and detained in custody and restrained of his liberty is an order and judgment had and rendered on the 22nd day of July, in the year 1869, by the circuit court of the United States, sitting at Jackson, for the
3 southern district of Mississippi, which judgment and order was rendered in and by said court in a suit pending therein, commenced by your petitioner for a writ of habeas corpus addressed to said court, and praying for a writ of habeas corpus, to be directed to the said R. S. Granger, A. Ames, J. S. Fletcher, and others. A copy of the record and proceedings of the said court and of the judgment aforesaid duly authenticated is here filed, marked Exhibit A, and made a part of this petition. Petitioner is advised that the judgment of said court in the premises is erroneous, and tends to the manifest injury of your petitioner. The said judgment is erroneous in this, that the said circuit court erred in dismissing the writ of habeas corpus issued on the petition aforesaid, and in ordering and remanding your petitioner into the custody of Brevet Major General Granger, to be by him held and detained in custody for the purposes and to answer to the charge set forth in the return of said Granger to the said writ of habeas corpus, &c.
4 Petitioner is advised that he has a right to have the judgment of the said circuit court reversed by this honorable court, and the error therein to the prejudice of this petitioner corrected, and said judgment reversed and corrected, and to that end he prays for a writ of certiorari directed, &c., commanding the clerk of the circuit court aforesaid to certify to this court a full, true, and perfect transcript of the record, judgment, and proceedings had in said court in suit therein, brought by your petitioner as aforesaid. He also prays for a writ of habeas corpus, &c., directed to the said Brevet Maj. Gen'l A. Ames, or the said Brevet Maj. General R. S. Granger, or the said Brevet Lieut. Col. J. S. Fletcher, or whoever may be the commanding officer of the military post at Jackson, Mississippi, or whoever else may have the custody of y'r petitioner, under the order and judgment of the court aforesaid, commanding such person to have the body of your petitioner before

this honorable court, at a day to be named by this court, to show
5 cause by what authority petitioner is imprisoned and restrained of his liberty; that the cause of his detention may be inquired into, to the end that the erroneous judgment aforesaid may be corrected and reversed, and petitioner restored to the liberty of which he has been illegally and unconstitutionally restrained.

E. M. YERGER.

Sworn and subscribed before me, this 2nd Oct., 1869.
[SEAL.] GEO. A. SMYTHE, *U. S. Commissioner.*

(Indorsed:) Petition of Edward M. Yerger for writ of certiorari and habeas corpus.

6 807.—EX PARTE EDWARD M. YERGER.—ON PETITION FOR HABEAS.

Transcript.—Index.

Caption	page 1
Petition & affidavit	" 2–4
Order on petition	" 4–5
Writ	" 5–6
Marshal's return on writ	" 6
Return to writ	" 7–9
Agreement of facts	" 9
Final order on hearing	" 10–11
Clerk's certificate	" 11

7[1] 807.—EX PARTE EDWARD M. YERGER.

On petition for habeas corpus.

Pleas before the Honorable Robert A. Hill, district judge of the United States for the districts of Mississippi, at a circuit court of the United States for the fifth circuit & southern district of Mississippi, held at the court-room of said court in Jackson, in said district, at a special term of said court, begun & held after due and legal notice thereof, on the first Monday of July, in the year of our Lord one thousand eight hundred and sixty-nine.

Be it remembered, that heretofore, to wit, on the 20th day of July, in the year of our Lord one thousand eight hundred and sixty-nine, being a day in the special term of the circuit court of the United States for the southern district of Mississippi, held at the court-room of said court in Jackson, in said district, after due and legal notice thereof, on the first Monday of July, in the year one thousand eight hundred and sixty-nine, Edward M. Yerger, by William Yerger, esquire, his attorney, presented in open court his certain petition in writing, which is in the following words & figures, to wit:

7[2] To the honorable the circuit court of the United States for the southern district of Mississippi:

The petition of Edward M. Yerger respectfully shows that he is a citizen of the State of Mississippi, and is illegally imprisoned and restrained of his liberty, under color of the authority of the United States, in violation of the Constitution and laws of the United States, at the military

post of Jackson in the State of Mississippi, by Brevet Major General A. Ames, Brevet Major General R. S. Granger, and a military commission appointed by said Major General Ames, composed of Brevet Brig. Gen. E. Swift, Brevet Lieut. Col. J. S. Fletcher, Brevet Major D. M. Vance, Capt. H. A. Theaker, Brevet Lieut. Col. Lloyd Wheaton, Brevet Lieut. Col. Clayton Haile, Brevet Capt. S. K. Mahon. Petitioner is so imprisoned and restrained of his liberty for the purpose of being tried, and he is now actually being tried by said military commission, upon a charge of murder, alleged to have been committed by petitioner on the 8th day of June, in the year 1869, in the county of Hinds, and State of Mississippi. Petitioner is a private citizen of the State of Mississippi, and is not now, and never was, in the army or naval service of the United States, nor in the militia in actual service of the United States, and he is in no way now, and never was in any way, connected with the army or navy of the United States,
7[3] and the charge against petitioner is not a case arising in the land or naval forces, nor in the militia when in actual service in time of war or public danger, and if petitioner is guilty of the crime charged against him, which he denies, it is an offence against the laws of the State of Mississippi, and for which he can only be tried in accordance with the constitution and laws of the State of Mississippi.

Petitioner was arrested and imprisoned, and he is now restrained of his liberty, without warrant founded on affidavit. No presentment or indictment of a grand jury has been found against him for said alleged crime. He has been denied the right of trial by jury by said military commission, and is now restrained of his liberty and held to answer before said military commission, who now have him on trial before them for said alleged crime of murder, without presentment or indictment of a grand jury; and they deny to him the right of trial by jury, all in violation of the Constitution and the laws of the United States, as well as the constitution and laws of the State of Mississippi.

Petitioner therefore prays for the writ of habeas corpus, directed to the said Brevet Major General A. Ames, Brevet Major General R. S. Granger, Brevet Brig. Gen. E. Swift, Brevet Lieut. Col. J. S. Fletcher, Brevet Major D. M. Vance, Capt. H. A. Theaker, Brevet Lieut.
7[4] Col. Lloyd Wheaton, Brevet Lieut. Col. Clayton Haile, Brevet Capt. S. K. Mahon, commanding them to have the body of your petitioner before this honorable court, at a day to be named by this court, to show cause by what authority petitioner is imprisoned and restrained of liberty, that the cause of the detention of petitioner may be enquired into, to the end that petitioner may be restored to the liberty of which he has been unconstitutionally and illegally restrained.

Petitioner further states that the civil courts in and for the State of Mississippi and for the county of Hinds are now open and have been open since the month of October, in the year 1865, for the trial of crimes and offences against the laws of said State, and there is no impediment to the trial of petitioner in and by said courts.

E. M. YERGER.

Personally appeared before me, E. M. Yerger, the petitioner, and made oath that this petition is true in substance and in fact.

[L. S.] GEO. A. SMYTHE,
U. S. Commissioner.

And thereupon, on said 20th day of July, in the year aforesaid, the following order was entered upon said petition, viz:

807.—EX PARTE EDWARD M. YERGER.

Petition for writ of habeas corpus.

8[5] It is ordered, by the court, on the petition of Edward M. Yerger, fi'ed herein, that a writ of habeas corpus be issued forthwith, directed to Brevet Major General A. Ames, Brevet Major General R. S. Granger, Brevet Brig. Gen'l E. Swift, Brevet Lieut. Col. J. S. Fletcher, Brevet Major D. M. Vance, Capt. H. A. Theaker, Brevet Lieut. Col. Lloyd Wheaton, Brevet Lieut. Col. Clayton Haile, and Brevet Capt. S. K. Mahone, in whose custody the petitioner, Edward M. Yerger, is detained, commanding the said parties so detaining the said petitioner in custody to make return to said writ, and to bring the said Edward M. Yerger before this court, in the court-room, at Jackson, and certify the true cause of the detention of said Edward M. Yerger, within the time prescribed by law.

And afterwards, to wit, on the said 20th day of July, A. D. 1869, a writ of habeas corpus was issued out of said court, in the following words and figures, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi:

The President of the United States of America, to Brevet Major General A. Ames, Brevet Major General R. S. Granger, Brevet Brigadier General E. Swift, Bevet Lieut. Col. J. S. Fletcher, Brevet Major D. M. Vance, Capt. H. A. Theaker, Brevet Lieut. Col. Lloyd
9[6] Wheaton, Brevet Lieut. Col. Clayton Haile, and Brevet Capt. S. K. Mahon, or to any other person or persons having the custody of Edward M. Yerger, greeting:

We command you that you have the body of Edward M. Yerger, by you imprisoned and detained, as it is said, together with the true cause of the detention of said Edward M. Yerger, before the circuit court of the United States, for the southern district of Mississippi, at Jackson, in said district, at the court-room of said court, within the time prescribed by law, to do and receive what shall then & there be considered concerning the said Edward M. Yerger.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at Jackson, this 20th day of July, A. D. 1869.

[L. S.] GEO. T. SWANN, *Clerk.*

Upon which said writ, the marshal of said district made his return, as follows, to wit:

Executed, personally, upon, & by delivering true copy to, Maj. Atwood for Gen. Ames, judge advocate for Gen. Swift; personally, on Gen'l Granger & Col. Wheaton, July 21st, 1869.

E. A. PEYTON, *U. S. M.*

Executed, personally, by copy, on Col. Fletcher, Major Vance, Capt. Theaker, Capt. Mahon; Col. Haile not found this 21st July, 1869.

E. A. PEYTON, *U. S. M.*

10[7] And afterwards, to wit, on the 22d day of July, A. D. 1869, being a day in the special term aforesaid, came into open court Brevet Major General R. S. Granger, and made his return to said writ, in writing, in the following words and figures, to wit:

To the honorable the circuit court of the United States for the southern district of Mississippi:

And now, to wit, on this twenty-second day of July, A. D. 1869, R. S. Granger, brevet major general United States army, commanding officer of the post of Jackson, Mississippi, in obedience to the writ of this honorable court bearing date the twentieth day of July, A. D. 1869, brings into court the body of E. M. Yerger, named in said writ, and certifies the following as the true cause of his detention:

That said E. M. Yerger was arrested and confined by the order of Brevet Major General Adelbert Ames, commanding officer of the fourth military district, upon the charge of having committed the crime of murder, in this: That on the eighth day of June, A. D. 1869, he, the said E. M. Yerger, of his malice aforethought, did, in the city of Jackson, county of Hinds, and State of Mississippi, with a deadly weapon, to wit, a large knife, inflict certain wounds in and upon the body of Brevet Major Joseph G. Crane, an officer of the United States army, from which said wounds the said Brevet Major Joseph G. Crane did immediately die.

It is further certified, in answer to said writ, that the said arrest
11[8] by order of Brevet Major General Adelbert Ames was made in accordance with the power and authority conferred upon the said Brevet Major General Adelbert Ames, as commanding officer of the fourth military district, by virtue of the act of Congress of March 2d, 1867, to provide for the more efficient government of the rebel States, whereby it is made the duty of the commanding officer of a military district, created by said act, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end may allow the local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military tribunals for that purpose.

That the trial of the said E. M. Yerger, charged, as aforesaid, with the murder of Brevet Major Joseph G. Crane, is now pending before a military commission convened by order of the said Brevet Major General Adelbert Ames, commanding the fourth military district, by virtue of the authority vested in him by law, which said military commission has full jurisdiction to hear and determine the question of the guilt or innocence of the said E. M. Yerger of the crime charged against him.

Therefore the said R. S. Granger, brevet major general United States army, commanding the post of Jackson, Mississippi, in view of the facts and the law above recited, prays that an order may issue from
12[9] this honorable court dismissing said writ and remanding the said E. M. Yerger to military custody.

R. S. GRANGER,
Brevet Major General U. S. Army, Comm'd'g Post of Jackson.

And afterwards, to wit, on the said 22d day of July, A. D. 1869, being a day in said term, the following agreement, in writing, was produced in open court and filed in said cause, viz:

807.—Ex Parte E. M. Yerger.

On petition for habeas corpus.

It is admitted on the trial of petitioner before the court on the petition and return, that petitioner is a private citizen of the State of Mississippi, and that he is being tried by the military commission, without presentment or indictment of a grand jury, and is being tried without

a jury. It is also admitted that the petitioner is not now and never was in the army or navy of the United States, and is not now and never was in any way connected with the army or navy of the United States, or in the militia in actual service in time of war or invasion.

THOMAS F. BARR,
Major, Judge Adv. U. S. Army, Counsel for Respondent.
W. YERGER,
For Petitioner.

G. GORDON ADAM,
Att'y of U. States, South. Dist. Miss.

13[10] And afterwards, to wit, on the same day & year last aforesaid, to wit, on the 22nd day of July, in the year of our Lord one thousand eight hundred & sixty-nine, being a day in the special term aforesaid, the following order was made and entered in said cause, to wit:

807.—EX PARTE EDWARD M. YERGER.

On petition for habeas corpus.

On this day the prisoner, Edward M. Yerger, was produced in open court by Brevet Major General R. S. Granger, having him in custody, in obedience to the writ of habeas corpus issued herein. It is therefore ordered by the court that the said Edward M. Yerger be placed in custody of the marshal of the southern district of Mississippi, to be by him held and detained in custody till the further order and judgment of the court; and afterwards, the cause coming on to be heard by the court upon the petition and writ of habeas corpus and the return to said writ made by the said Brevet Major General R. S. Granger, and facts agreed at hearing of the same, and now the court, having heard the same, and being sufficiently advised in the premises, and being of opinion that the custody and detention of the said Edward M. Yerger by the said Brevet Major General R. S. Granger for the causes set forth in his return, is rightful and in accordance with law, the court, therefore, accordingly adjudges that the imprisonment of the prisoner for the causes in
14[11] the return to the writ of habeas corpus in this case set forth are sufficient cause and warrant in law for his detention by said Granger. It is, therefore, ordered by the court that the writ of habeas corpus herein issued be, and the same is hereby, dismissed, and that the prisoner, Edward M. Yerger, be remanded to the custody of the said Brevet Major General R. S. Granger, to be by him held and detained in custody for the purposes and to answer to the charge as set forth in the return of said Granger.

UNITED STATES OF AMERICA,
Southern District of Mississippi, ss:

I, George T. Swann, clerk of the circuit court of the United States for the southern district of Mississippi, hereby certify that the foregoing ten, & the above portion of this page, (11,) contain a full, true, and complete transcript of the petition, process, proceedings, and final order of our said circuit court in the case of Edward M. Yerger, ex parte, on habeas corpus, as the same remain of record in our said court.

In testimony whereof, I have hereto set my hand and affixed the seal of said circuit court, at office in Jackson, in said district, this 22d day of September, A. D. 1869.

[SEAL.] GEO. T. SWANN, *Clerk.*

In the Supreme Court of the United States.

EX PARTE YERGER.

POINTS OF THE ATTORNEY GENERAL.

The Supreme Court of the United States.

DECEMBER TERM, 1868.

EX PARTE YERGER.

Points of the Attorney General.

FIRST POINT.

The Supreme Court of the United States can grant a writ of *habeas corpus ad subjiciendum* only in the exercise of its appellate jurisdiction, and by means of such writ can revise only the proceedings of those tribunals over which and in respect to which it has appellate control and authority.

The leading case upon this subject is *ex parte Bollman and Swartwout*, (4 Cranch, 75,) who had been committed by the circuit court of the District of Columbia on a charge of treason against the United States. The only point of difficulty in that case was upon the construction of the 14th section of the judiciary act of September 24, 1789, (1 Stat., 81,) which provides—

"That *all* the before-mentioned courts of the United States [Supreme Court, circuit court, and district court] shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment, *provided*, that writs of *habeas corpus* shall

in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

It was held that by the sound construction of this section the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to the Supreme Court, and the argument was rejected that the restrictive words of the first sentence of the section, "which may be necessary to the exercise of their respective jurisdictions," limited the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States, mentioned in the act, to exercise their respective jurisdictions in some cause which they are capable of finally deciding. To the objection that an inquiry by *habeas corpus* into the cause of commitment in a criminal case was an exercise of original jurisdiction in a case not within the constitutional grant of original jurisdiction to the Supreme Court, Chief Justice Marshall replied: "The jurisdiction which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail."

Before the case of *Bollman and Swartwout*, the court had issued writs of *habeas corpus* in two cases of commitment for criminal offenses. The first was *United States* vs. *Hamilton*, (3 Dallas, 17,) in which the prisoner was charged with high treason, a capital offense, and had been committed upon a warrant of the *district judge* of Pennsylvania. The prisoner was admitted to bail. The § 33 of the judiciary act, (1 Stat. 91,) authorized this. The second was *Burford's* case, (3 Cranch, 448,) where the party had been committed by a defective warrant of certain justices of the peace, and brought before the circuit court of the District of Columbia, on *habeas corpus*, which, after hearing, passed an order, given in full by Mr. Justice Curtis, in *Kaine's* case, (14 How., 124,) remanding the prisoner to jail until he entered into a recognizance to keep the peace. It was under

this order of the circuit court that Burford was imprisoned when he petitioned the Supreme Court for a writ of *habeas corpus*.

After *Bollman and Swartwout*, the case next in order is *ex parte Kearney*, (7 Wheaton, 38,) which was an application for *habeas corpus* by a prisoner in custody under a commitment of the circuit court of the District of Columbia, for contempt as a witness. The court said two questions arose: *first*, whether this court has authority to issue a *habeas corpus* where a person is in jail under a warrant or order of any other court of the United States; *secondly*, whether, if it have, a case is made out to justify the exercise of such an authority. "As to the first question, it is unnecessary to say more than that the point has already passed in *rem judicatam* in this court." The writ was refused, however, on the ground that the writ was not a proper remedy in case of commitment for contempt by a court of competent jurisdiction.

Ex parte Watkins (3 Peters, 193) was the case of a prisoner in jail in the District of Columbia under a judgment of the circuit court in a criminal prosecution. The application for the writ was refused on the ground that the judgment was of a court of general and final criminal jurisdiction, and justified the imprisonment.

Ex parte Watkins (7 Peters, 568) was the case of a party in custody under writs of *capias ad satisfaciendum* issued out of the circuit court of the District of Columbia, and the ground of the application was that the marshal had not brought him into court on the return-day of the writs, but detained him in prison contrary to the statute of Maryland.

On the question of jurisdiction the court said: "The question turns on this, whether it is an exercise of original or appellate jurisdiction. If it be the former, then, as the present is not one of the cases in which the Constitution allows this court to exercise original jurisdiction, the writ must be denied. If the latter, then it

may be awarded, since the act of 1789, sec. 14, has clearly authorized the court to issue it. The award of the *capias* must be considered as the act of the circuit court, it being judicial process issuing under the authority of the court. If the court should, upon the hearing, decide that the *capias ad satisfaciendum* justifies the present detainer, and should remand the prisoner, it would be clearly an exercise of appellate jurisdiction; for it would be a revision and confirmation of the act of the court below."

George Holmes, plaintiff in error, vs. Silas H. Jennison et al, (14 Peters, 540.) A writ of *habeas corpus* was, on the petition of George Holmes, issued by the supreme court of Vermont, and on the return thereto by the sheriff, stating the warrant of the governor to be the cause of his detention, he was remanded by the court. Holmes prosecuted a writ of error to the Supreme Court of the United States. The writ of error was dismissed, the court being equally divided.

Ex parte Barry, (2 Howard, 65.) This was a petition by an alien for a *habeas corpus* to obtain the custody of his infant child. "The application," said the court, "in effect seeks the exercise of original jurisdiction in the matter upon which it is founded." The writ was refused.

Ex parte Dorr, (3 Howard, 103,) was an application for the writ by a party imprisoned on State process; but the court refused it.

Barry vs. *Mercein et al.*, (5 Howard, 103,) was a case brought up by writ of error to the circuit court of the southern district of New York, in which the circuit court refused to grant a writ of *habeas corpus*, prayed for by a father to take his infant child out of the custody of its mother. It was held that the Supreme Court had no appellate power in the case, and the writ was dismissed for want of jurisdiction.

Metzger's case, (5 Howard, 176,) was that of an appli-

cation for the writ by a prisoner committed to the custody of the marshal by the district judge, at his chambers, under the French treaty of extradition.

This court refused the writ on the ground that there is no form in which an appellate power can be exercised by it over the proceedings of a district judge at his chambers. "He exercises a special authority, and the law has made no provision for the revision of his judgment. It cannot be brought before the district or circuit court; consequently cannot, in the nature of an appeal, be brought before this court. The exercise of an original jurisdiction only could reach such a proceeding, and this has not been given by Congress, if they have the power to confer it."

In re Kaine, (14 Howard, 103,) a prisoner committed by a United States commissioner under the British extradition treaty, applied to the circuit court of the United States for the southern district of New York for a writ of *habeas corpus*, which was granted; and upon a hearing before the district judge presiding in that court the prisoner was remanded to the custody of the marshal. He then presented a petition to the circuit judge, addressed to the justices of the Supreme Court, for a writ of *habeas corpus*. A motion was also made in the Supreme Court for writs of *habeas corpus* and *certiorari*, and one question argued was, in the language of Mr. Justice Nelson, whether "the prisoner was or was not held in confinement under the order of the circuit court," or whether the decision of the circuit court was "the cause of commitment." For if it was, it was admitted that this court had jurisdiction to inquire into it; and if it was not, the decision of the circuit court was not within the exigency of the writ, formed no part of its subject-matter, and was not within the appellate control of the Supreme Court. The application was denied on the merits.

Ex parte William Wells, (18 Howard, 307.) Wells was convicted of murder before the criminal court of the county of Washington, in the District of Columbia,

and sentenced to be hung. The President granted "a pardon of the offense of which he was convicted, upon condition that he be imprisoned during his natural life—that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington"—and Wells accepted the pardon with the condition. Wells applied to the circuit court for a writ of *habeas corpus*, which was granted; and that court, after a hearing, remanded him to the penitentiary. Wells then petitioned the Supreme Court for a writ of *habeas corpus*, which was denied.

Ex parte Milligan (4 Wall., 2) came before the Supreme Court upon a certificate of a division of opinion between the judges of the circuit court, and arose under the act of March 3, 1863, (12 Stat., 755,) and has no application to the case at bar.

Ex parte McCardle (6 Wall., 318) was a motion to dismiss an appeal from the circuit court of the district of Mississippi, under the act of February 5, 1867, (14 Stat., 385.) This right of appeal was taken away by the act of March 27, 1868, (15 Stat., 44.) (*Ex parte McCardle*, 7 Wall., 506.)

It abundantly appears from the foregoing cases, that to bring a case within the appellate jurisdiction of this court, in the sense requisite to enable it to award the *writ of habeas corpus* under the judiciary act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court. This court has never granted this writ when the prisoner was not at the time he petitioned for it in confinement under an order of a court whose proceedings can be revised by the Supreme Court.

SECOND POINT.

This court cannot exercise any appellate control, by appeal, writ of error, or any other proceeding over the military commission by virtue of whose ~~sentence~~ the petitioner is imprisoned, nor has this court power in any form, or by any procedure, to revise the proceedings of that commission in the case of the petitioner.

1. This court has appellate power only in cases provided for by Congress, (Durrousseau *v.* U. S., 6 Cranch, 307,) and Congress has not provided by law for a review by this court of the acts and proceedings of this or any other military commission exercising jurisdiction under the authority or color of authority of the United States. Every existing statutory regulation of the appellate power of this court excludes and excepts from that jurisdiction cases adjudicated by such tribunals.

2. But independently of this, whatever jurisdiction was possessed by this military commission was not a part of that judicial power which is defined in the 3d article of the Constitution; and, therefore, this court could and can have no appellate control or authority over that body.

"Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution."

Benner *v.* Porter, 9 How., 244.

Ins. Co. *v.* Canter, 1 Pet., 545.

The appellate power of this court cannot extend beyond the action of the inferior courts established by Congress to take original jurisdiction under the Constitution, and which exercise judicial power therein conferred.

United States *v.* Ritchie, 17 How., 533.

THIRD POINT.

The addressing a writ of *habeas corpus* to the military commander in Mississippi would be an exercise of original and not of appellate jurisdiction by this court. He does not hold the petitioner under any order or decree of the circuit court, but by military power. The order of the circuit court merely left the matter as it found it. The military commander could discharge the prisoner, at his pleasure, notwithstanding the action of the circuit court.

FOURTH POINT.

The *habeas corpus* issued with the *certiorari* as an adjunct to the appellate power, is only permitted where the custody of the prisoner is an essential part of the judgment or decree from which the appeal is taken.

FIFTH POINT.

The repeal by the statute of March 27, 1868, of so much of the act of Feb. 5, 1867, as granted appellate power to this court in cases of this nature, was intended and should be construed as taking away, not the whole appellate power in cases of *habeas corpus*, but the appellate power in cases to which that act applied. It did not mean merely to substitute a cumbrous and inconvenient form of remedy for a direct and simple one.

Ex parte McCardle, 7 Wallace, 506.

Ex parte McCardle 7 Wallace 506

SIXTH POINT.

The statute of 1867, providing for military government in Mississippi, necessarily suspended the writ of *habeas corpus* in that State, which it was within the clear constitutional authority of Congress to do.

E. R. HOAR,
Attorney General.

Brut P Phillips

Supreme Court of the United States.

EX PARTE EDWARD M. YERGER.

The petitioner, on the 22d day of July, 1869, filed his petition in the Circuit Court of the United States for the Southern District of Mississippi, setting forth that he was a citizen of the said State, in no wise connected with the military service of the United States; that he was then held in custody for trial before a military commission for an offence alleged to have been committed "against the peace and dignity of the State," and praying for the writ of habeas corpus that the legality of his commitment may be inquired into.

The writ was issued, and on the 22d July he was produced in open Court by Brevet Major General R. S. Granger, whereupon it was ordered by the court, that "the said Edward M. Yerger be placed in the custody of the Marshal of the Southern District of Mississippi, to be by him held and detained in custody until the further order and judgment of the Court."

Afterwards, the "cause coming on to be heard," the following entry was made: "The Court therefore accordingly adjudges, that the imprisonment of the prisoner for the causes in the return to the writ of habeas corpus, in the case set forth, are sufficient cause and warrant in law for his detention by said Granger. It is therefore ordered, that the writ be dismissed, and the prisoner remanded to custody of said Brevet Major General R. S. Granger, to be

by him held and detained in custody for the purposes, and to answer to the charge as set forth in the return of said Granger."

On these facts the petitioner founds his application to this Court for the writ of habeas corpus, aided by a certiorari. And first, as to the jurisdiction.

JURISDICTION.

The 14th section of the act of 1789 provides that the several Courts of the United States "shall have power to issue the writs of scire facias, habeas corpus, and all other writs not specially provided for by the statute, which may be necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law; and that either of the Justices of the Supreme Court, as well as the Judges of the District Court, shall have power to grant the writ of habeas corpus for the purpose of an inquiry into the cause of the commitment: *Provided*, That writs of habeas corpus shall in no cases extend to prisoners in gaol unless they are in custody under or by color of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify."

This statute at an early day was discussed before this Court, and it was then held—

1st. That the restrictive words "necessary to the exercise of their respective jurisdictions" did not apply to the writ of habeas corpus.

2d. That the proviso extended to the whole section.

3d. That where the commitment was by an inferior Court of the United States, this Court, in the exercise of its appellate jurisdiction, could issue the writ to inquire into the cause of the commitment. (Ex parte Bolman, 4 Cr., 101.)

In Ex parte Crane, which was an application for a mandamus, it was insisted by Judge Baldwin—"that there

were but two cases in which the appellate jurisdiction could be exercised, to wit, appeals and writs of error; and that the writ of mandamus contains no order to remove a cause, or any proceedings therein to the Court issuing it, nor has it this effect."

But the decision of the Court was, that a "mandamus to an inferior Court of the United States is in the nature of appellate jurisdiction. That in England it is awarded by the Chancellor, but in the United States it is expressly conferred on this Court, which exercises both common law and chancery powers; is invested with appellate powers; and exercises extensive control over all the Courts of the United States."

It is therefore apparent that the exercise of the appellate power is not limited to any particular form; where the object is to revise a judicial proceeding the mode is wholly immaterial, and a writ of habeas corpus, or mandamus, a writ of error or an appeal may be used as the Legislature may prescribe. (2 Story Comm. Con., 570.)

When the habeas corpus is used it may not be, strictly speaking, a power of revision, which includes properly the power to affirm or reverse the judgment, and so establish or destroy it, but a power to arrest the *execution* of a void judgment; it acts directly on the effect of the judgment, and collaterally on the judgment itself.

In Bolman's case the Chief Justice says: "The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore the questions are separated, and may be tried in different Courts. The decision that the individual shall be imprisoned must always precede the application for the writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature."—4 Cr., 101.

So in Ex parte Metzger, Justice McLean says: "It may be admitted there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of habeas corpus. In this form nothing more can be examined into than the legality of the commitment. In criminal cases this Court can have no revisory power over the decisions of the Circuit Court; and yet, as appears from the cases cited, 'the cause of commitment in that Court' may be examined in this on a writ of habeas corpus, and this is done by the exercise of appellate power."—5 How., 191.

It may be said that the "cause of the commitment" is not to be found in the action of the Circuit Court now under consideration; that this Court only remanded him to the custody in which it found him.

Our answer is, that when Yerger filed his petition claiming that his imprisonment was in violation of the Constitution, he then instituted a *suit*, there was then a *case* arising under the Constitution to which the judicial power attaches; and when a judgment is rendered denying the right claimed, the appellate power is properly invoked. (2 Story C. C., 485–6.)

In the celebrated case of Yates *vs.* The People, 4 John., Yates who had been imprisoned for contempt by the Chancellor, applied to the Supreme Court for a habeas corpus. On the return to the writ the Court held the return to be good, and remanded him into custody; whereupon he sued out his writ of error.

A most elaborate discussion was had as to the character and effect of this judgment or order. A majority of the Court held "that the question brought up on a writ of habeas corpus was, Is the prisoner legally imprisoned? If the Court decide in the affirmative, the deprivation of liberty continues. Is not this a final decision of the case, and does it not deprive the party of the remedy he solicits?

But admitting it is not technically a judgment, yet it clearly comes within the definition of Coke. It is an award, in the nature of a judgment. And as a habeas corpus is in the nature of a writ of error, so is the determination upon it in the nature of a judgment."

The same question has been considered by this Court. Holmes was arrested by Gov. Jennison, of Vermont, who ordered him to be sent to Canada to answer to an indictment. He applied for habeas corpus to the Supreme Court of the State, and, on coming in of the return thereto, was remanded to custody. A writ of error was sued out to this Court under the 25th section of the Judiciary Act, and it was held by the Chief Justice, whose opinion was concurred in by Story, McLean, and Wayne, Justices, that this was a "final judgment" in a "suit" within the meaning of this section.

Catron, Justice, delivered a separate opinion, in which he concurred in this view; and on this point of the case Baldwin, Justice, alone dissented.

In a very recent case the question was presented under the 22d section, when the Court, speaking through Nelson, Justice, declared that no doubt was entertained that the judgment was a final judgment, and that the only objection to the jurisdiction was the want of the property value required by that section.—Pratt *vs.* Fitzhugh, 1 Black, 272.

The same principle was applied in the case of Weston *vs.* The City of Charleston, 2 Pet., 449. Prohibition was applied for to prevent the collection of an unconstitutional tax. This was refused, and the refusal was held to be a *final judgment* in a *suit.*

We turn back to the case In re Kaine, decided in 14 How., 103. Kaine, a fugitive from Great Britain, was arrested by the Commissioner of the United States. He applied to the Circuit Court for a habeas corpus, and, on return thereto, was remanded to custody. Thereupon he applied to this Court for a habeas corpus and certiorari.

jurisdiction, in the opinion of Judge Curtis, is, whether there has been an order of the Circuit Court *changing the custody*. Now by turning to the entry made in this case, it will be found that when the prisoner was produced under the writ, the Court ordered, that "the said Edward M. Yerger be placed in custody of the Marshal of the Southern District of Mississippi, to be by him held and detained in custody until the further order and judgment of the Court."

It was by the judgment of the Court that the custody thus held by the Marshal was transferred to that of the military authorities, and so, in maintaining the jurisdiction of the Court, in the present application, we are fortified with the opinions of all the Judges of this Court since its organization, saving only that of Judge Baldwin.

We scarcely deem it necessary to consider the effect of the act of 5th of February, 1867. This did not in anywise operate a repeal of the provisions of the act of 1789, but was passed for the declared purpose of conferring "*additional authority.*" The act of 1868, which took away the right to an "*appeal*" given by it did not affect the appellate power of this Court by means of the habeas corpus under the act of 1789. It is sufficient on this point to refer to the decision made at the last term:

"Counsel seem to suppose that if effect be given to the repealing act in question, that the whole appellate power of the Court in cases of *habeas corpus* is defeated. But this is an error; the act of 1868 does not except from that jurisdiction any cases but *appeals* from Circuit Courts under the *act of* 1867. It does *not affect the jurisdiction which has been previously excercised.*" Ex parte McArdle, 7 Wall., 515.

FINALLY.

As to the argument *ab in convenienti*, we are content to use the language of Nelson, J.: 14. How. 135

1. Oct 1869

P. Phillips
pro pet

Ex parte Edward M. Yerger,

ON MOTION FOR HABEAS CORPUS IN SUPREME COURT.

Argument on Question of Jurisdiction

BY

WILLIAM YERGER.

Printed by W. H. Moore, 484 11th st.

ARGUMENT.

MAY IT PLEASE THE COURT:

It is objected by the Attorney General that this Court has no jurisdiction to grant the writs of *certiorari* and *habeas corpus* asked in this case; and that question, by direction of the Court, is to be argued before it will consider whether the facts show a proper case for the writ, the power being admitted.

I may be pardoned the remark that, after a careful examination of the cases, it would seem if any question of jurisdiction can ever be settled and determined by precedent, the jurisdiction of this Court to grant the writ of *habeas corpus*, to operate in the nature of a writ of error, for the purpose of inquiry into the cause of commitment by an Inferior Court, and of revising such judgment, has been fully settled beyond the reach of controversy.

This question arose at an early day in the history of the Court, and has been repeatedly considered. The decisions are unvarying and uniform. The jurisdiction has been maintained in every instance, and, as far as I have been able to find, only two Judges—Justices Baldwin and Curtis—have expressed adverse opinions; and the opinion of the latter was limited to the special form of the judgment under review.

At the risk of being tedious, as the question has been again seriously pressed upon the Court, I purpose to consider somewhat in detail the previous adjudications, though they seem to be so uniform in sustaining the jurisdiction that it would hardly appear to be an open question at this day.

I will concede in the outset that this Court, in the exercise of its original jurisdiction, cannot award the writ, though if Congress had not legislated on the subject it is well worthy of consideration whether, the judicial Courts being established, they would not, *proprio vigore*, possess the power to issue the writ by necessary implication, from the peculiar words of the Constitution. But as an appellate tribunal, "exercising extensive control over all the Courts of the United States," it is believed that its jurisdiction has been fully established, and can be successfully maintained.

The Constitution, in section 9, Article 1, declares that "the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it." The first Congress, treating this provision as mandatory, took immediate steps to render it efficient.

The 14th section of the act of 1789, establishing judicial Courts, declares, "that all the before-mentioned Courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in jail unless they are in custody under or by color of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify."

In *ex parte* Bollman ~~vs.~~ and Swartwout (4 Cranch R., 75) this statute was carefully considered, and Chief Justice Marshall, delivering the opinion of the court, uses this language: "It may be worthy of remark that this act was

passed by the first Congress of the United States sitting under a Constitution, which declared that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety might require it." Acting under the immediate influence of this injunction, they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus.*" As this Court has not original jurisdiction to award this writ, it must, if it ever exercises the power conferred by this statute, proceed by virtue of its appellate powers. But it is said the appellate power can only be exercised in a suit which has been begun in an inferior court. Conceding this, the question then arises whether an application for the writ of *habeas corpus* in an inferior court is a suit, and whether the judgment of such Court is a judgment in a suit, to be revised by writ of error, or appeal, or a proceeding in the nature of a writ of error. This question has been fully put at rest by the decision rendered here in Milligan's case. (4 Wallace R.)

It was objected there that this court could not take jurisdiction on a certificate of division, because, being an *ex parte* application in which no judgment had been rendered, it was not a "cause" or "suit" within the meaning of the law. To this argument the Court reply: "But it is argued that the proceeding does not ripen into a cause until there are two parties to it. This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties if the Court had issued the writ and brought those who had Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any

legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right."

In any legal sense, action, suit, and cause are convertible terms. Milligan had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their actions, and should not suffer, because, without his fault, they were unable to render a judgment. * * * But the true meaning of the term "suit" has been given by this Court. One of the questions in Weston vs. City Council of Charleston (2 Peters R., 449) was whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him."

The case now under consideration is relieved of the objection in Milligan's case, that there was only one party, and therefore was no suit or cause. Here the Court below "issued the writ and brought those who held the petitioner in custody before it," and on the return made to the writ rendered the judgment complained of. It was, therefore, not only a "suit" of the petitioner for redress, but was a cause pending in the Circuit Court with two litigating parties, each represented by counsel before it.

It will not be denied then that the proceedings before the Circuit Court of the Southern District of Mississippi were in a suit or cause pending therein, and that its judgment was the final judgment of the Court against the petitioner, denying the right asserted by him under the Constitution and laws of the United States. This entitled him to invoke the appellate power of this tribunal to revise that judgment, if there is any mode by which it can be brought before the Court.—2 Story, S. C. C., 485–6. The manner in which this Court shall acquire control of a case

in order to exercise the appellate power, is not restricted to any particular form. It may be by appeal or writ of error, or otherwise, as the legislature, or the usage and practice of the Court may direct.

(2 Story's Com. on Constitution, 570.)

"A writ of *habeas corpus*," say the Supreme Court of New York in Yates vs. the People, 4 Johns. R., "is in the nature of a writ of error."

The case of Bollman and Swartwout before referred to, arose as early as 1807. They had been committed to prison by the Circuit Court of the District of Columbia on a charge of treason against the United States, and a motion was made in this Court for a writ of *habeas corpus* to bring the parties before it, that the cause of their commitment might be inquired into. It was objected then, as it is now, that the Court had no jurisdiction to issue the writ. The case underwent elaborate examination, and after a thorough analysis of the statute and of the various kinds of writs of *habeas corpus* in use at the common law, the conclusion was reached that this Court, in the exercise of its appellate power, did have jurisdiction under the act of 1789, "to award writs of *habeas corpus*, in order to examine into the cause of the commitment;" and proceeding to inquire whether the case then before it was a proper case for the exercise of its jurisdiction, the following language was used: "The only objection is, that the commitment has been made by a Court having power to commit and bail. Against these objections, the argument from the bar has been so conclusive that nothing can be added to it.

If, then, this were *res integra*, the Court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts, and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the Court. From that decision this

Court would not lightly depart.—United States vs. Hamilton, 3 Dallas R., 17."

The Chief Justice (Marshall) then proceeds: "If the act of Congress gives this Court the power to award the writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the Constitution.

In the mandamus case, Marbury vs. Madison, (1 Cranch Rep. 175,) it was declared that the Court would not exercise original jurisdiction, except so far as that jurisdiction was given by the Constitution. But so far as that case distinguished between original and appellate jurisdiction, that which the Court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior Court, by which a citizen has been committed to jail. It has been demonstrated at the bar that the question brought forward on *habeas corpus*, is always distinct from that which is involved in the case itself. The question whether the individual shall be imprisoned, is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separate and may be decided in different courts. The decision, that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus*, and this writ must be for the purpose of revising that decision, and therefore appellate in its nature. But this point is also decided in Hamilton's case and in Burford's case."

Nothing can be added to the clearness and force of this reasoning. Its logic is unanswerable, and the conclusion that this Court, in the exercise of its appellate power, has jurisdiction to award the writ cannot be avoided.

The appellate power of this Court extends to the revision of the judgments of Inferior Courts rendered in suits pending before them. An application for a writ of *habeas corpus* in an Inferior Court is the commencement of a suit, and the judgment of the Court touching it, is the judgment of the Court in a suit. The act of 1789 confers upon this Court the power to issue writs of *habeas corpus*. It

cannot constitutionally, in virtue of its original jurisdiction, exercise the power. It follows, therefore, that in order to exercise the power conferred by the act, it must proceed by virtue of the appellate jurisdiction given to it to revise the judgments and proceedings of Inferior Courts. To deny appellate jurisdiction of the Court, would render entirely nugatory the power given to award the writ; and if there were a doubt in such a case the Court would solve the doubt in favor of the jurisdiction, being, as Chief Justice Marshall said, "in favor of liberty;" and because in such cases a construction is always given, "*ut res magis valeat quam pereat.*" Nor is the award of the writ in a proper case, a matter of discretion. It is the right of the citizen to call for it, and as it is his right, it is the duty of the Court to grant it. The act is not merely permissive, it is imperative; it is not that "it may be lawful," but "it shall be lawful" for the Court to issue the writ.

Whenever in a statute it is declared that "it shall be lawful" for a tribunal or officer to exercise power or jurisdiction in a given case, and the public interests or private right call for the exercise of the jurisdiction; then the words, "shall be lawful," are held to be mandatory, not permissive. (See case of Mayor of City of New York, 3 Hill, 614, and Moran vs. Fearson, 9 Howard R., 248.)

In a late case decided by this Court, commenting on a power conferred by the words, "may, if deemed advisable," the following language was used by Mr. Justice Swayne: "The conclusion to be deduced from the authorities is that where a power is given to public officers, in the language of the act before us, or in equivalent language, whenever the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right and to prevent a failure of justice. It is given as a remedy

to those entitled to invoke its aid, and who would otherwise be remediless.

In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but "to impose a positive and absolute duty." (Supervisors vs. United States, 4 Wallace R., 435. See also to same point a still later decision affirming the doctrine here laid down—City of Galena vs. Amy, 5 Wallace R., 705.)

Sustained by the unanswerable logic of the Chief Justice, and acting in accordance with the precedent set in Hamilton's and Burford's cases, the writ of *habeas corpus* was awarded in the case of Bollman and Swartwout. They were brought before this Court, and after hearing the evidence, the decision of the Circuit Court of the District of Columbia, by which the parties had been committed for treason, was reversed, and they were ordered to be discharged.

Hamilton's case was decided as early as 1795. In that case the prisoner had been committed upon the warrant of the District Judge of Pennsylvania on a charge of treason. He was brought before the Supreme Court on a writ of *habeas corpus*, and the Court, after having the case under advisement for some days, ordered him to be admitted to bail. (3 Dallas R., 17; 1 Curtis R., 76.)

Ex parte Burford's case arose in 1806. The opinion of the Court in it was also delivered by Chief Justice Marshall. Burford was confined in the jail of the county of Alexandria, in the District of Columbia. He petitioned this Court for the writ of *habeas corpus*, alleging that he was confined under and by color of process of the United States, and prayed for a *certiorari*, &c.

Marshall, C. J., delivering the opinion of the Court, says: "There is some obscurity in the act of Congress, and some doubts were entertained by the Court as to the construction of the Constitution. The Court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of the United States vs. Hamilton (3 Dall.,

17) was decisive. It was there determined that this Court could grant a *habeas corpus*. Therefore, let the writ issue immediately, together with a *certiorari*, as prayed." On hearing the case the prisoner was discharged. (4 Cranch R., 448; 1 Curtis R., 638.)

The next case to which I will call the attention of the Court is that of *ex parte* Kearney, decided in 1822. It appeared that the prisoner had been committed for contempt by the judgment of the Circuit Court of the District of Columbia and applied here for a writ of *habeas corpus*. Judge Story delivered the opinion of this Court. In that opinion he says: "Upon the argument of this motion two questions have been made—first, whether this Court has authority to issue a *habeas corpus* where a prisoner is in jail under the warrant or order of any other Court of the United States; secondly, if it have, whether upon the facts stated a fit case is made to justify the exercise of such an authority.

As to the first question it is unnecessary to say more than that the point has already passed *in rem adjudicatum* in this Court. In the case of Bollman and Swartwout it was expressly decided, upon full argument, that this Court possessed such an authority, and the question has ever since been considered at rest."

On the second point the Court held that the facts stated did not make a fit case to exercise the jurisdiction. (7 Wheat. R., 78; 5 Curtis R., 311.)

The question again came before this Court in 1830, in *ex parte* Watkins. (3 Peters R., 193.)

Watkins was indicted and convicted in the Circuit Court of this District of a criminal offence, and was imprisoned by the judgment of that Court. He applied to the Supreme Court for a writ of *habeas corpus*. Chief Justice Marshall, delivering the opinion of the Court, says: "This application is made to a Court which has no jurisdiction in criminal cases, (3 C., 169,) which could not revise their judgment—could not reverse or affirm it, were the record brought directly up

by writ of error. The power, however, to award writs of *habeas corpus* is conferred expressly on this Court by the 14th section of the judicial act, and has been repeatedly exercised. No doubt exists respecting the power. The question is whether this be a case in which it ought to be exercised. * * * * The writ of *habeas corpus* is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error to examine into the legality of the commitment."

Again he says, "This writ is as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of the commitment. The court can undoubtedly inquire into the sufficiency of that cause."

It was insisted in the case of Watkins, that the judgment of the Circuit Court of the District of Columbia was void, because it had no jurisdiction of the subject matter, and therefore might be examined into on *habeas corpus*.

In reply to this, it was admitted that the judgment of a court proceeding without jurisdiction of the person or subject matter, would be *coram non judice* and therefore null and void, and no sufficient cause of detention; yet it was declared that the judgment of a court of general criminal jurisdiction by which a party is convicted and sentenced to punishment for a crime, though erroneous, would be sufficient cause of detention, and could not be treated as a nullity in a proceeding upon *habeas corpus*.

It is worthy of note that in the opinion in this case, the court cited approvingly, the decision in the case of Wise v. Withers, 3 Cr., 331, holding that courts-martial are inferior courts of limited jurisdiction whose judgments may be questioned collaterally, and that where a court-martial had no jurisdiction over a person not belonging to the militia, its judgment in such case is *coram non judice* and a nullity, and furnishes no protection to the officer who executes it; (3 Peters R., 193; 8 Curtis R., 370.)

In the foregoing cases of Watkins and Kearney, the court carefully preserves the distinction taken in Bollman and Swartwout, between an application for the writ of *habeas corpus*, on a commitment to jail before trial and conviction, and an application for the writ after trial and conviction, and a judgment by a court of competent jurisdiction condemning a party to punishment; holding in the first case that the court has power to issue the writ, and in the latter, that it has not.

The next case in order of time in which the question of jurisdiction came before the court, is that of ex parte Watkins, reported in (7 Peters R., 568, S. C.; 10 Curtis R., 569.) From the facts reported, it appears that Watkins had been indicted at the suit of the United States, in the Circuit Court for the District of Columbia, had been tried and found guilty and sentenced to three months imprisonment and also to the payment of certain fines. There was no award in either of the judgments, that the prisoner should stand committed until the sentence was performed by payment of the fines.

Under these judgments he was committed to jail and detained in custody after the expiration of the specific term of imprisonment specified in the judgment, but he had not paid the fines adjudged against him.

On these facts, application was made to this Court for the writ of *habeas corpus*. The Court held that, having been placed in custody under the judgment of the Circuit Court, and continued therein under color of that judgment, he was in contemplation of law, imprisoned under judicial process awarded by that Court. It further held, that in the exercise of its appellate power, this Court could take jurisdiction and award the writ. It was granted, the prisoner was brought before the Court, and after examination of the case he was discharged. The question of jurisdiction was fully considered and sustained.

In ex parte Metzger, 5 Howard R., 189, the question again came up. In this case, the Court refused to grant

the writ. No doubt, however, was expressed as to the power of this Court to award the writ, where a party is in custody under the jurisdiction or order of a court. That was admitted. But the writ was refused, because Metzger was imprisoned by the order of a judge at chambers and not in court, or by a court. This distinction was then taken for the first time between a commitment court and a commitment by a magistrate or other party not acting in court.

In the opinion delivered by Judge McLean, he says: "It may be admitted there is some refinement in denominating that an appellate power, which is exercised through the instrumentality of a writ of *habeas corpus*. In this form nothing more can be examined, than the legality of the commitment. In criminal cases, this Court can have no revisory power over the decisions of the Circuit Court, and yet, as appears from the case cited, 'the cause of commitment in that court' may be examined in this, on a writ of *habeas corpus*, and this is done by the exercise of appellate power."

In the conclusive opinion on the question of jurisdiction, delivered by Mr. Justice Nelson in the case of ex parte Kaine, he makes the following comment on Metzger's case: "In the case ex parte Metzger, the prisoner was committed to the custody of the Marshal by the District Judge and not in court. This case undoubtedly stands alone, and has very much narrowed the power of the Court in issuing this great writ in favor of the liberty of the citizen, from that repeatedly asserted in previous cases. But I do not propose to disturb it. For the case before us, is within the doctrine of this case, and of every other, that has heretofore been passed upon by the Court, as I shall proceed briefly to show."

The Court will not fail to observe that the case of ex parte Watkins, in 7th Howard, arose and was decided after Metzger's case, which has never been considered, as a denial or even as the expression of a doubt of the juris-

diction to award the writ, in the exercise of its appellate power, whenever a case came before it, of a party committed to custody by the order or process of a court.

In the order of time, the next case, in which the question of jurisdiction arose and was considered, is that of ex parte Kaine, 14 How. R., 103.—(20 Curtis R., 63.) Kaine, under the extradition treaty with Great Britain, was arrested as an alleged fugitive from justice and brought before an United States Commissioner, who made an order committing him to custody, to abide the order of the President. A writ of *habeas corpus* was then issued by the Circuit Court of the United States for the Southern District of New York. Kaine was brought before that Court, in which the District Judge then presided. After a hearing, upon all the objections raised by the prisoner, the writ was dismissed, and Kaine was remanded and continued in the custody of the Marshal under the arrest and commitment by the process of the Commissioner. Afterwards a petition addressed to the Judges of the Supreme Court, was presented to Justice Nelson at chambers, praying for a writ of *habeas corpus*. He granted the writ, and on the prisoner being brought before him, he made an order "that in consequence of the difficult and important questions involved in the case, it be heard before all the Justices of the Supreme Court in bank," &c. When the case came on to be heard before the Court, it was held that it could not take jurisdiction of it on the order of the Associate Judge of this Court, adjourning the hearing of it before the Court in bank.

An application was then made for a writ of *habeas corpus* and a *certiorari* to the Circuit Court, in order to review the judgment made by that Court, remanding the prisoners to the custody of the Marshal.

On the hearing of this motion the Court was divided in opinion, and the writ was refused. But it was not refused because of any doubt of the jurisdiction of the Court to award the writ, but because a majority of the Court was

of opinion that on the merits the prisioner was not entitled to his discharge. No member of the Court expressed an opinion, that the Court did not have power, in the exercise of its appellate jurisdiction, to award the writ in order to "inquire into the cause of the commitment" made by the Circuit Court, and to review the judgment of that Court. A doubt even on this point was not intimated by a single member of the Court. This will be made manifest by referring to the case, and examining the opinions and carefully noting what was said by the several judges.

Catron, judge, delivered an opinion which was concurred in by judges McLean, Wayne, and Grier. This opinion was adverse to the motion for the writ, because on the merits of the case, they did not believe the party entitled to it. But there is an express admission of the jurisdiction of the court.

The language of Catron, judge, is very explicit. "The case has been carefully and ably argued before us on behalf of the prisoner, and anxiously considered by this court, on every ground presented, and especially on its merits, and I am authorized to say, that Judges McLean, Wayne, and Grier, agree with the views above given, and that we refuse the motion for the writ on the merits. We are not disposed under the circumstances to exercise the jurisdiction of the court in the case."

More explicit recognition of the jurisdiction to grant the writ could not be declared.

An elaborate opinion on the question of jurisdiction as well as on the merits was delivered by a member of this court, still surviving to aid it with his counsel; in which the jurisdiction was maintained, with a force of argument so conclusive, that Chief Justice Taney declined to write an opinion, because the argument of his associate rendered a discussion by him unnecessary. Justice Daniel as well as Chief Justice Taney concurred in the opinion of Judge Nelson alike on the question of jurisdiction as on the merits.

I will not quote from this opinion. This court in its examination will not overlook it.

A separate opinion was delivered by Mr. Justice Curtis, who declined to consider the case upon its merits; because upon the record made in that particular case, he did not believe the court had jurisdiction to award the writ. But his opinion is a conclusive authority in favor of the jurisdiction to award the writ in the present case, which contains every requirement deemed by Judge Curtis essential to the exercise of jurisdiction. I propose to recur to the opinion of Judge Curtis, to sustain this assertion.

Kaine was brought before a Commissioner of the United States upon a requisition of the British Consul, asking his commitment as a fugitive from justice. After the case was heard, he was by warrant of the Commissioner committed to the custody of the Marshal to abide the requisition of the President under the extradition treaty. After he was so committed, the Circuit Court of the United States for the Southern District of New York, issued a writ of *habeas corpus* directed to the Marshal. He was brought into Court, and an order was made, remanding him to the custody of the Marshal. That order is in the following words: "The Court accordingly adjudges that the commitment and imprisonment of the prisoner for the causes in the return to the *habeas corpus* in the case set forth, are sufficient cause and warrant for his detention by the Marshal.

Therefore, it is ordered by the Court, that the writ of *habeas corpus* allowed in this case be dismissed, and that the prisoner be remanded and continued in the custody of the Marshal, under such, his arrest and commitment by the aforesaid process."

Judge Nelson says in his opinion, and the authorities cited by him fully sustain the position, that when a prisoner is brought into court by *habeas corpus*, "pending the examination or hearing, the prisoner, in all cases, on the return of the writ, is detained, not on the original warrant,

but under the authority of the writ of *habeas corpus*. He may be bailed on the return, *de die in diem*, or remanded to the same jail whence he came or to any other place of safe-keeping under the control of the Court, or officer issuing the writ, and by its order brought up from time to time till the Court or officer determine whether it is proper to discharge or remand him absolutely. The King's Bench may, pending the hearing, remand to the same prison or to their own, the Marshalsea. The efficacy of the original commitment is superseded by this writ, while the proceedings under it are pending, and the safe-keeping of the prisoner is entirely under the authority or direction of the Court issuing it or to which the return is made."

Commenting on the order made in Kaine's case, Judge Curtis says: "It makes no new commitment, and issues no new process as an instrument for it, but only pronounces the old process valid, and consequently the continuance of the commitment under it legal. The custody was at no time changed. Certainly, when a prisoner is brought into Court upon the return of a *habeas corpus* and *subjiciendum*, he is then in the power and under the control of the Court; but until the Court makes some order changing the custody, it remains. The Court may in some cases admit to bail, and may also take order for the future production of the prisoner without bail; but in all cases, until the Court makes some order changing the custody either for the care or security of the prisoner, or founded on the illegality of his commitment, the original custody continues. In this case no such order was made."

Again he says, commenting on the case of *ex parte* Burford: "It is undoubtedly true that the imprisonment of Burford was considered to be under a commitment by the Circuit Court, and the case is an authority to prove that when a writ of *habeas corpus* is returned in the Circuit Court and that Court makes an order imprisoning the party, this Court may review that order."

In the case at bar, the very requirements deemed essen-

tial by Judge Curtis to give this Court jurisdiction will be found to exist. In Kaine's case the prisoner was in the custody of the Marshal, and was by him brought into Court; there was no order, Judge Curtis says, changing the custody, and "until the Court makes some order changing the custody, it remains." Judge Curtis admits, however, that the Court may make such order, and if it does make it, and the original custody be changed, whether for security or otherwise, any subsequent order made by the Circuit Court imprisoning the party is a new commitment, and is an order which this Court can review.

In the case at bar the prisoner was originally detained in custody by Major General Granger, and was by him brought into Court; but when brought into Court the custody was changed; he was taken out of the custody of General Granger and placed, by order of the Circuit Court, in the custody of the Marshal. After reciting the fact that the prisoner was "produced in open Court by Brevet Major General R. S. Granger, having him in custody, in obedience to the writ of *habeas corpus* issued herein," the order proceeds: "It is, therefore, ordered by the Court that the said Edward M. Yerger be placed in the custody of the Marshal of the Southern district of Mississippi, to be by him held and detained in custody till the further order and judgment of the Court." Here, then, was a change of custody. The accused was taken out of the custody of the military commander and placed in the custody and control of an officer of the civil authorities. The case was then presented to the Court on the petition of the accused and the return of General Granger to the writ, and on the facts agreed, and, after argument, the Circuit Court made an order remanding the prisoner to the custody of General Granger. That order is as follows:

"And afterwards, the case coming on to be heard by the Court upon the petition and writ of *habeas corpus*, and the return to said writ made by the said Brevet Major

General R. S. Granger, and the facts agreed on hearing of the same. And now the Court having heard the same, and being sufficiently advised in the premises, and being of opinion that the custody and detention of the said Edward M. Yerger, by the said Brevet Major General Granger, for the causes set forth in his return, is rightful, and according to law. The Court, therefore, accordingly adjudges that the imprisonment of the prisoner for the causes in the return to the writ of *habeas corpus* in the case set forth are sufficient cause and warrant in law for his detention by said Granger. Therefore, it is ordered by the Court that the writ of *habeas corpus* issued herein, directed, &c., be, and the same is hereby, dismissed, and that the prisoner, Edward M. Yerger, be remanded to the custody of the said Brevet Major General R. S. Granger, to be by him held and detained in custody for the purposes and to answer to the charge as set forth in the return of the said Granger."

It is this order and judgment we now seek to review—an order committing the accused to the custody of General Granger to be held and detained in custody by him for trial by a military commission on the charge set forth in the petition and return.

By the writ of *habeas corpus* the prisoner was brought into Court; he was "then in the power and under control of the Court." By the order of the Court he was taken out of the custody and control of the military authorities and placed in the custody of the Marshal; and on the hearing of the cause, instead of an order discharging him, which on the return and facts agreed we contend was the proper order to have been made; the accused was, by the erroneous judgment of the Circuit Court, remanded to the custody of General Granger, to be imprisoned and detained by him for trial by a military commission, and the accused is now committed and in custody under that order of the Circuit Court. The case is one which falls within the principles laid down by this Court from the beginning as

proper for the exercise of its appellate jurisdiction by writ of *habeas corpus*. It is a case which falls within the rule laid down by Judge Curtis in the dissenting opinion in Kaine's case, and it meets every requirement which he deemed essential to justify the Court in exercising jurisdiction. I think it may be safely affirmed that there is no opinion, nor even a dictum of this Court, in any case in which a rule is laid down denying the jurisdiction of this Court by writ of *habeas corpus* and *certiorari* to bring a prisoner before it to inquire into cause of commitment," and to review the judgment of an Inferior Court committing him to custody.

After the decision in Kaine's case, the question of jurisdiction again came up in *ex parte* Wells, 18 Howard R., 307. Jurisdiction to award the writ was taken by the Court, but the application was refused on the merits. Judge Curtis again dissented. He stated in his dissenting opinion that the question of jurisdiction was left undecided in Kane's case. In this, I think, he was mistaken; but it certainly was decided in Wells' case, as Judge Curtis himself affirms. He says, "but the question was then left undecided (in Kaine's case;) and in this case, for the first time in my judgment, has jurisdiction been assumed on the ground that, as the Circuit Court had the prisoner before it, and has remanded him, this Court, by writ of *habeas corpus*, may examine that decision, and see whether it be erroneous or not."

Here is an affirmation by Judge Curtis that jurisdiction was so taken by this Court in the case of Wells.

No other case having any special bearing on any of the questions I have been discussing, seems to have come before the Court, till the case of *ex parte* Vallandigham, in the year 1863, reported in 1 Wallace R., 243.

In that case, it appeared, that the prisoner had been arrested in Ohio, by order of General Burnside, and brought before a military commission organized by him, and he was put upon trial, before that commission, "for having

uttered in a speech at a public meeting disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government, in its efforts for the suppression of an unlawful rebellion." The writ of *habeas corpus* was then suspended, and the application to this Court was not for the writ of *habeas corpus*, but for a *certiorari* to be directed to the Judge Advocate General of the Army of the United States to send up to this Court, for its revision, the proceedings of the Military Commission by which Vallandigham had been tried and sentenced to imprisonment.

The only point decided in Vallandigham's case was that a military commission exercises a special authority, and does not exercise judicial power in the sense in which judicial power is granted to the courts of the United States. In short, the decision was that the Military Commission was not a court, and therefore the Supreme Court had no power to review or revise its proceedings, or to issue a *certiorari* to bring them up for revision.

It has no bearing on the points I have been discussing any further than it may be deemed to reannounce what had been previously ruled in Metzger's case, that this Court has no power to issue the writ of *habeas corpus*, unless the order of commitment be made by a court.

In the case now before the Court the order of commitment we seek to review and revise, is the order and judgment of the Circuit Court for the Southern District of Mississippi. It may be remarked in passing, that the learned Judge who delivered the opinion in Vallandigham's case, made a mistake as to the reason for which the writ was refused in Kaine's case. He says: "*In re* Kaine, the Court denied the motion, saying that the Court's jurisdiction was appellate, and that the case had not been so presented to it, and for the same cause refused to issue a writ of *certiorari*, which, in the course of the argument, was prayed for." Here is a recognition by Mr. Justice Wayne, of the appellate jurisdiction of this Court to grant the writ. But

I have heretofore shown, that the writ was refused, not because the appellate power of the Court was not invoked, but because in the opinion of four members of the Court, though the jurisdiction was admitted by them, the prisoner was not entitled to it on the merits. One member of the Court—Curtis—denied it for want of jurisdiction. Three members were in favor of granting the writ, asserting the jurisdiction, and believing he was entitled to it on the merits. Hence, although seven members conceded the jurisdiction, the writ was denied, because five out of eight were opposed to granting it, though for different reasons. Seven members admitted and recognized the jurisdiction, and only one denied it, but a majority being opposed, though for different reasons, to its issuance, the writ was denied.

No other case came before this Court presenting any questions materially bearing on the case now before the Court till *ex parte* Milligan, 4 Wallace R.

As I purpose to call the particular attention of the Court to this case in an argument that may be made on another question to be discussed hereafter, I dismiss it for the present, with the remark that this Court held in Milligan's case that an application to the Circuit Court for a writ of *habeas corpus* by a party held in custody by order and judgment of a military commission makes a case in Court, and that a difference in opinion on any point arising in that case can be certified under the act of Congress for decision by this tribunal. If then, by such application, there is a case in Court, certainly whenever that case is decided by the Court there is a judgment upon a case pending in Court, and that judgment is subject to review by this tribunal in the exercise of its appellate jurisdiction. The mode of exercising that jurisdiction where the judgment of the Inferior Court commits a party to prison, or deprives him of his liberty, is under the act of 1789, the writ of *habeas corpus* to bring the prisoner's body before it, and the writ of *certiorari* to bring up the record and

proceedings of the Inferior Court. The law thus stood from 1789 till 1867. In the latter year an amendment was made to the acts on the subject of writs of *habeas corpus*. It was passed on the 5th Februnry, 1867, and is styled "An act to amend an act to establish the judicial courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine. The first section of this act provides "that the several Courts of the United States and the several Justices and Judges of such Courts, within their respective jurisdictions, *in addition to the authority already conferred* by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States," &c.

It will be seen at a glance that the Act of 1867 greatly enlarged the jurisdiction of the Courts of the United States in granting the writ of *habeas corpus*, and extended it to many cases not embraced by the Act of 1789. It also gave new and additional remedies by which the assertion of the right could be made more efficient, both by original and appellate proceedings. By the Act of 1789 it was declared "that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless they are in custody, under or by color of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify." But the Act of 1867 took away this restriction or limitation of the jurisdiction of the Courts, and extended the jurisdiction to all cases where a party was restrained of his liberty in violation of the Constitution or any treaty or law of the United States, whether he was thus held in custody or deprived of his liberty under or by color of the authority of the United States or of a State law, or judgment or authority of a State Court. The Act of 1867 did not repeal the Act of 1789; it conferred powers on the Courts "in addition to the authority already conferred by law." It took away no existing remedy by which the writ could be made effective

but it gave additional and cumulative remedies to make it more efficient. It took away no existing or previous rights, but greatly enlarged the jurisdiction of the Courts. It simplified the modes of proceeding both in the original and appellate forum. It declared that "from the final decision of any Judge, Justice, or Court inferior to the Circuit Court, an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States," &c. A direct appeal to the Supreme Court was thus allowed "in addition" to the former appellate remedy by practice of the Court to award the writ of *habeas corpus* and *certiorari* under the Act of 1789.

But in 1868, that portion of the Act of 1867 which gave a direct appeal to the Supreme Court was repealed. The Act of 1868 is in the following language: "That so much of the Act approved February 5, 1867, entitled 'An Act to amend an Act to establish the judicial Courts of the United States, approved September 24, 1789,' as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby, repealed." But this repeal of that part of the Act of 1867, allowing a direct appeal in every case, whatever its merits might be, had no effect upon the former remedies existing prior to that Act.

Under the act of 1867, the right of appeal was absolute, it extended to every case. It could not be refused in any case, though an inspection of the record might show at a glance that the case was without merit and that the judgment appealed from was clearly right. But under the act of 1789, it was entirely competent for the court to refuse the writ of *habeas corpus*, to operate in the nature of a writ of error, if upon looking into the whole case, the court was satisfied, that on the facts and merits of the case

the party was not entitled to relief. The act of 1867, then was cumulative and additional. It enlarged the rights of the party, but did not abridge them. It took away no existing remedy, but gave another, simple, more direct and more efficient, "in addition" to that previously existing.

This was so declared by this court in ex parte McCardle, 7 Wallace, in response to the suggestions of counsel, that the repealing act of 1868, left the Supreme Court without appellate jurisdiction in cases of *habeas corpus*. The court declared that such was not its effect. The Chief Justice by whom the opinion of the court was delivered, says, "counsel seem to have supposed if effect be given to the repealing act in question the whole appellate power of the court, in cases of *habeas corpus* is denied. But this is an error. The act of 1868, does not except from that jurisdiction any cases, but appeals from the Circuit Court under the act of 1867. It does not effect the jurisdiction which was previously exercised."

Ex parte McCardle, 7 Wallace, 506.

It is a rule in the construction of statutes, certainly as old as the year books, that the repeal of a statute by implication is never favored.

Dwarris on statutes, 532.

Referring to an argument made in the case of City of Galena, vs. Amy, 5 Wallace, 705, that a former statute had been repealed by a later, Swayne, Justice, says: "There is no express repeal, and we think there is none by implication. The latter is not ~~found~~ favored in the law. Repeal by implication when the prior and the latter act can consistently stand together is never admitted."

Again: It is declared to be "a ge neral rule that subsequent statutes, which add accumulative penalties and institute new methods of proceeding do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words." (Dwarris on Statutes, 532.

There was no repugnancy between the act of 1789 and 1867. They could consistently stand together. There were no express words of repeal—no negative words. The remedies might well co-exist as cumulative, as we see in the provision in chancery cases of an appeal or writ of error provided by different statutes to effect the same object, the review of the decree of an Inferior Court. The act of 1867 did not expressly, and, as there is no repugnancy between them, will not be construed to have repealed by implication the act of 1789. But even if it were conceded that it did repeal the act of 1789, yet the act of 1867, the repealing act, is itself repealed by the act of 1868, and the act of 1789 is revived and restored by such repeal.

The rule is thus stated: "By the repeal of a repealing statute, (the new law containing nothing in it that manifests the intention of the Legislature that the former act shall continue repealed,) the original statute is revived." (Dwarris on Statutes, 534.)

The jurisdiction of this Court, therefore, now stands as it stood prior to the act of 1867, and I think it has been clearly shown that it may, as an appellate tribunal, under the act of 1789, by the writs of *habeas corpus* and *certiorari*, obtain jurisdiction to review the judgments of an Inferior Court, which erroneously deprives a party of his liberty, or without sufficient cause commits him into custody.

I have entered into needless detail, and have elaborated this point more than probably ought to have been done, before a tribunal so familiar with the whole subject as this Court is; but the Court having designated a day for the argument of the question of jurisdiction, admonished me that it was not unwilling to hear the question discussed, and probably at length. This, with the fact that I was unwilling in my anxiety to leave anything unsaid, that I felt able to say, having any bearing on a case of such great im-